Supreme Court, U. S.
FILED
AUG 26 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-149

PETER T. STATHES,

Appellant,

v.

STATE OF MARYLAND,

Appellee.

ON APPEAL FROM THE COURT OF SPECIAL APPEALS OF MARYLAND

MOTION TO DISMISS

FRANCIS B. BURCH,
Attorney General
of Maryland,
CLARENCE W. SHARP,
Assistant Attorney General,
Chief, Criminal Division,
BERNARD A. RAUM,
Assistant Attorney General,
Counsel for Appellee.

The Daily Record Co., Baltimore, Md. 21202

TABLE OF CONTENTS

	PAGE
MOTION TO DISMISS APPEAL	1
OPINION	2
JURISDICTION	2
QUESTION PRESENTED	2
STATEMENT OF FACTS	2
ARGUMENT:	
The prosecution by the State of Maryland of the president of a federally chartered savings and loan association is not preempted by federal law where the facts show that the defendant used his Association's funds as compensating balances	8
CONCLUSION	17
APPENDIX A	1a-4a

TABLE OF CITATIONS

Cases

Abbate v. United States, 359 U.S. 187, 79 S. Ct. 666, 3 L. Ed. 2d 29 (1959)	17
Cross v. North Carolina, 132 U.S. 131, 10 S. Ct. 47, 33 L. Ed. 287 (1889)	12
Easton v. Iowa, 188 U.S. 220, 23 S. Ct. 288, 47 L. Ed. 452 (1903)	9

	PAGE
Erich v. Webb, 336 F.2d n53 (9th Cir. 1964)	17
In Re Election of Directors, 51 N.Y. Supp. 2d 816 (1944)	16
Jennings v. United States Fidelity & Guaranty Company, 294 U.S. 216, 55 S. Ct. 394, 79 L. Ed. 869 (1935)	16
Lewis v. Fidelity and Deposit Company, 292 U.S. 559, 54 S. Ct. 848, 78 L. Ed. 1425 (1934)	16
People of California v. Zook, 336 U.S. 725, 69 S. Ct. 841, 93 L. Ed. 1005 (1949)	17
People of the State of New York v. Eno, 155 U.S. 89, 15 S. Ct. 30, 39 L. Ed. 80 (1894)	12
U.S. v. Brookshire, 514 F.2d 768 (1975)	11
U.S. v. Jackson, 470 F.2d 384 (5th Cir. 1972) ...	14
Uphaus v. Wyman, 360 U.S. 72, 79 S. Ct. 1040, 3 L. Ed. 2d 1090 (1959)	14
Westfall v. U.S., 274 U.S. 256, 47 S. Ct. 629, 71 L. Ed. 1036 (1927)	14

Statutes

Estates and Trusts Article, Section 15-201(c)	8
Title 12, U.S.C., Section 1425a	3
Title 12, U.S.C., Section 1464(d) (4) (A)	14
Title 12, U.S.C., Section 1730 (g) (1)	14
Title 18, U.S.C., Section 657	4
Title 18, U.S.C., Section 3231	5
Title 18, U.S.C., Section 656	12
Annotated Code of Maryland:	
Article 27, Section 132	3
Article 23, Section 161B (1966 Rep. Vol.)	6
Article 23, Section 159 (1969 Cum. Sup.)	7

Miscellaneous

	PAGE
12 CFR — Chapter V, Federal Home Loan Bank Board, Sections 523.10 through 523.14	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-149

PETER T. STATHES,

Appellant,

v.

STATE OF MARYLAND,

Appellee.

ON APPEAL FROM THE COURT OF SPECIAL APPEALS OF MARYLAND

MOTION TO DISMISS APPEAL

Appellee moves to dismiss the appeal from the judgment and opinion of The Court of Special Appeals of Maryland entered on December 30, 1975. That judgment affirmed the Appellant's conviction for embezzlement in the Circuit Court for Montgomery County, Maryland on December 10, 1974. The grounds for this motion to dismiss appeal are that Appellant has not raised any substantial federal question in this appeal.

OPINION

The opinion below is reported at 29 Md. App. 474, 349 A.2d 254 (1975).

JURISDICTION

The Appellant is asserting jurisdiction in this court by virtue of the provisions of Title 28 U.S.C., § 1257(2) in that it is alleged that the judgment of the highest court of the State of Maryland upholding the validity of a state statute, as applied, is alleged to be repugnant to the banking laws of the United States and criminal sanctions thereto.

QUESTION PRESENTED

Is the prosectution by the State of Maryland of the president of a federally chartered savings and loan association preempted by federal law where the facts show that the Defendant used his association's funds as compensating balances?

STATEMENT OF FACTS

The Appellant, Peter T. Stathes, was shown by overwhelming evidence to have set up static checking accounts in the Bank of Bethesda and Citizens Bank and Trust Company of Maryland using Montgomery Federal Savings and Loan Association funds. The testimony at his trial indicated that such accounts were unusual and were not categorized as daily operating accounts. Further testimony indicated that the Citizens Bank and Trust Company considered a $50,000.00 deposit made by Stathes in the name of Montgomery Federal to be a compensating balance for a loan extended to Joel Kline. Additional evidence disclosed that such accounts were brought to balance when Joel Kline's office was notified that the accounts were below

the compensating balance minimum. The testimony of William Brain indicated that as a member of the Board of Directors had he known that such funds were being used as compensating balances he would have disallowed the practice. Although accounts were opened on authority of the Board of Directors, Brain had no reason to suspect that either of the two accounts were for compensating balances since the Appellant never discussed it. The witness also did not know the extent, if any, of the Appellant's business connections with Joel Kline.

On December 10, 1974 a Jury sitting in the Circuit Court for Montgomery County, Maryland, found the Appellant guilty of Count I of Criminal Number 14956 charging embezzlement in violation of Article 27 § 132 of the Annotated Code of Maryland.

The Appellant subsequently appealed his convictions to the Court of Special Appeals of Maryland which tribunal in a reported opinion upheld the jurisdiction of the State of Maryland to try Appellant for his offenses. The Court of Appeals of Maryland declined to issue a writ of certiorari to the Court of Special Appeals in that case and so denied the Appellant any further relief.

STATUTES INVOLVED

Title 12, U.S.C., § 1425a:

> "No member of a Federal Home Loan Bank shall make or purchase any loan at any time when its cash and obligations of the United States are not equal to such amount as the Federal Home Loan Bank Board shall by regulations prescribe: *Provided*, That such amount shall not be less than 4 per centum or more than 8 per centum of the obligation of the member on withdrawable accounts or, in the case of any member insurance company, such other base as the Board may

determine to be comparable. The Board is authorized in said regulations to prescribe from time to time different amounts, within the limitations hereinbefore specified, for different classes of member institutions, and for such purposes the Board is authorized to classify such members according to type of institution, size, location, rate of withdrawals, or such other basis or bases of differentiation as the Board may deem to be reasonably necessary or appropriate for effectuating the purposes hereof. Failure to comply with the provisions hereof shall constitute ground for removal from membership."

Title 18, U.S.C., § 657:

"Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, Home Owners' Loan Corporation, Farm Credit Administration, Federal Housing Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, or any small business investment company, and whoever, being a receiver of any such institution, or agent or employee of the receiver, embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

Title 18, U.S.C., § 3231:

"The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

Liquidity Regulations

12 CFR — Chapter V, Federal Home Loan Bank Board

LIQUIDITY

§ 523.10 Definitions.

For the purposes of this section, §§ 523.11 and 523.12:

(a) The term "cash" means cash on hand and unpledged demand deposits in a Federal Home Loan Bank, an insured bank, or the Bank for Savings and Loan Associations, Chicago, Illinois. The term "cash" does not include gold in any form.

. . .

(g) The term "liquid assets" means the total of cash, accrued interest on unpledged assets which qualify as liquid assets under this paragraph, or would so qualify except for their maturities, and the book value of the following unpledged assets (including such assets held subject to a repurchase agreement), as long as principal and interest on such assets are not in default:

. . .

(G)(4)(ii) No consideration, other than discounting to a current market rate of interest, is received by the member from a third party in connection with the making or acquiring of such deposits (excluding loans of unsecured day(s) funds) by the member and no consideration is received by the member from a third party in connection with loans of unsecured day(s) funds by the member;

§ 523.11 Liquidity Requirements.

(a) *General.* For each calendar month, each member, other than a mutual savings bank as to which there is in effect the election provided for in paragraph (e) of this section, shall maintain an average daily balance of liquid assets in an amount not less than 6½ percent of the average daily balance of the member's liquidity base during the preceding calendar month, except as otherwise provided in paragraphs (b) and (d) of this section. For each calendar month, each member, other than a mutual savings bank or an insurance company, shall maintain an average daily balance of short-term liquid assets in an amount not less than 2½ percent of the average daily balance of the member's liquidity base during the preceding calendar month, except as otherwise provided in paragraphs (b) and (d) of this section.

. . .

(c) *Calculation of average daily balance.* For the purposes of this section, §§ 523.10 and 523.12, the "average daily balance of liquid assets," "average daily balance of short-term liquid assets," and "average daily balance of the member's liquidity base," respectively, shall be calculated by adding the member's liquid assets, short-term liquid assets, or liquidity base, respectively, as of the close of each business day in a calendar month, and for any nonbusiness day, as of the close of the nearest preceding business day, and by dividing the respective total by the number of days in such month.

Art. 23, § 161B, Anno. Code Md. (1966 Rep. Vol.)

(a) *Definition of "association".* — As used in this subtitle, the word "association" shall mean building, savings and loan or homestead association or any other similar association by whatever name called.

(b) *Domestic and foreign associations.* — The provisions of this article shall apply to all associations heretofore or hereafter organized under the laws of this State; and to all foreign associations duly authorized to do business in this State;

(c) *Federal associations.* — Unless federal laws or regulations provide otherwise, federal associations incorporated pursuant to the Homeowners Loan Act of 1933, as amended, and their members shall be subject to the provisions of this subtitle and shall possess all of the rights, powers, privileges, immunities and exemptions granted by this article to associations operating hereunder and to the members thereof. (1961, ch. 205.)

Art. 23, § 159 (1969 Cum. Sup.)

Any association eligible to become a member of the federal home loan bank system, may convert itself into a federal savings and loan association, as provided for in the act of the Congress of the United States, approved the 13th day of June, 1933, entitled "The Home Owners Loan Act of 1933," with amendments, with the same force and effect as though originally incorporated under such act of Congress, and the procedure to effect such conversion shall be as follows:

. . .

(d) *Effect of taxation or doing business.* — For purposes of taxation or doing business within this State, any association availing itself of the privileges of this section shall be regarded as a domestic corporation of this State, and its property, shares and assets shall be taxed in the same manner and to the same extent as the property, shares and assets of domestic associations of this State, and shall in every other respect be regarded as a domestic corporation of this State.

Article 27, § 132, Annotated Code of Maryland:

"If any executor, administrator, guardian, committee, trustee, receiver or any other fiduciary shall

fraudulently and willfully appropriate to any use and purpose not in the due and lawful execution of his trust, any money or any other thing of value which may come into his hands as such executor, administrator, guardian, committee, trustee, receiver, or in any other fiduciary capacity, or secrete it with a fraudulent intent to appropriate it to such use or puspose, he shall be deemed guilty of embezzlement, and shall be punished upon conviction by imprisonment in the penitentiary for not less than one year nor more than five years."

Estates and Trusts Article, § 15-201(c):

"(a) *General.* — In this subtitle the following words have the meanings indicated.

. . .

"(c) *Fiduciary.* — 'Fiduciary' includes a trustee under any trust expressed, implied, resulting or constructive, executor, administrator, guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer, or any other person acting in a fiduciary capacity for any person, trust, or estate."

ARGUMENT

THE PROSECUTION BY THE STATE OF MARYLAND OF THE PRESIDENT OF A FEDERALLY CHARTERED SAVINGS AND LOAN ASSOCIATION IS NOT PREEMPTED BY FEDERAL LAW WHERE THE FACTS SHOW THAT THE DEFENDANT USED HIS ASSOCIATION'S FUNDS AS COMPENSATING BALANCES.

The thrust of the Appellant's argument establishing an alleged substantial federal question is that pursuant to federal statutory and regulatory scheme Congress has preempted any State prosecution of the officers of federally chartered savings and loan associations for State offenses committed during the conduct of their office. Specifically he suggests that Congress when it enacted Title 18, U.S.C., §657 prohibiting willful misapplication of funds by an officer or employer of a federal savings and loan association, preempted Maryland's fraudulent misappropriation by a fiduciary State statute. Thus the Appellant seems to be suggesting that the offense in the instant case is covered by federal criminal sanctions.

On the other hand the Appellant's argument under *Easton v. Iowa,* 188 U.S. 220, 23 S. Ct. 288, 47 L. Ed. 452 (1903) together with the citing of the provisions of Chapter 5 of 12 CRF, Federal Home Loan Bank Board Regulations, seems to indicate that the Appellant feels that he is operating *pursuant* to federal law and has not committed a federal crime.

A. Federal Criminal Sanctions

It is submitted that the Appellant's reliance in the first instance on the case of *Easton v. Iowa, supra,* to suggest preemption is misplaced. It is submitted that the thrust of the decision in *Easton* was that the Appellant there received deposits knowing his institution to be insolvent contrary to Iowa criminal code provisions; Easton's actions were found to be permissible under federal regulations. It was held that although states have the power to define and punish crimes by general law applicable to all persons within its jurisdiction they are without power to make special laws applicable to banks organized and operating under the laws of the United States. It was felt that the operations of national banks should not be subjected to limitations and restrictions imposed by State legislation which are contrary to federal statutes organizing the national banks. Perhaps the most telling factor, however, in the *Easton* case is that the Supreme Court found that the Supreme Court of Iowa misinterpreted federal law when it stated that there was no act of Congress prohibiting the receipt of deposits by national

banks or their officers when the bank is insolvent. Mr. Justice Shiras speaking for the Supreme Court listed the regulations and procedures by which a federal bank might nonetheless receive deposits notwithstanding the fact that it might be insolvent. In essence the Supreme Court found that federal banking regulations would permit the comptroller of the treasury to continue operating a bank and to continue receiving deposits under such circumstances. Accordingly it is submitted that the basic proposition in the *Easton* decision is that the Iowa statute made unlawful that which could be lawful under federal law.

Furthermore the Appellant asserts that the provisions of 12 CFR, §§ 523.10 through 523.14 control the disposition of liquidity accounts and that the Appellant's activities with regard to the deposits were proper thereunder. Therefore, Maryland has been preempted under the *Easton* decision. First of all nothing in the Federal Home Loan Bank Board regulations requires or suggests that compensating balances may be used to maintain liquidity requirements thereunder. Secondly, liquid assets are defined as being among other things, cash and accrued interest on unpledged assets; § 523.10(a) defines the term "cash" as unpledged demand deposits. Clearly under the circumstances in the instant case an account used as a compensating balance, where a minimum deposit is constantly maintained, is not an unpledged demand deposit within the meaning of the term cash as it relates to liquidity requirements.

In 1969 the General Counsel of the Federal Home Land Bank Board had occasion to comment in an opinion with regard to whether or not a federal savings and loan association has authority to engage in the granting of compensating balances. He found that

while it was true that a federal savings and loan association might deposit funds in a bank or demand deposit accounts, such deposits must basically further the goals and objectives of the association. It was felt that any restriction upon the deposit or any right of any other party or parties in the deposit would mean that the deposits would not qualify as cash in satisfaction of the liquidity requirements. It would seem then that the right of withdrawal as demonstrated by the evidence in the instant case was not to be solely determined by the depositor, *i.e.,* Montgomery Federal Savings and Loan Association, but rather was to be determined by the two banks who held the accounts as compensating balances. The testimony clearly indicates that whenever the compensating balances account got below a certain minimum deposit the banks involved notified Joel Kline who in turn had Montgomery Federal Savings and Loan Association return the balances of the accounts to the accepted minimum. Clearly the depositors of Montgomery Federal Savings and Loan Association did not have unimpaired rights to the funds and accordingly they should not have qualified as liquid assets or unpledged cash. It is interesting to note that William Brain testified at the trial on the merits that had he as a member of the Board of Directors known that the Appellant, Stathes, was using the funds in the manner so disclosed, he would have disallowed the practice (T. E. 130-131).

See Appendix A for the May 28th, 1969 opinion of Arthur W. Leibold, Jr., general counsel, Federal Home Loan Bank Board. Similarly the United States Court of Appeals for the Tenth Circuit in *U.S. v. Brookshire*, 514 F.2d 768 (1975) concluded that in a prosecution for misapplication of bank funds the use of an inter-bank deposit as a compensating balance for a loan to the

president of the depositing bank was a willful misapplication in violation of Title 18, U.S.C., §656.[1] Thus it would seem without further question that the Appellant's activities as disclosed by the evidence below, and to which he can raise no objection here, clearly indicates that he violated state as well as federal law and regulations in making the compensating balances for Joel Kline.

B. Extent Of State Incursion.

It is necessary to comment upon two of the cases cited by the Appellant. In the case of *People of the State of New York v. Eno,* 155 U.S. 89, 15 S. Ct. 30, 39 L. Ed. 80 (1894), the Supreme Court reversed the Second Circuit Court of Appeals in *Eno, supra,* on the grounds that the Second Circuit should have permitted the highest court of the State of New York to first decide whether or not it had jurisdiction to try the petitioners. The court declined to consider the merits of the appeal whatsoever and directed that the judgment of the Second Circuit was reversed and directed that a petition for writ of habeas corpus be dismissed as being without jurisdiction. Secondly, in *Cross v. North Carolina,* 132 U.S. 131, 10 S. Ct. 47, 33 L. Ed. 287 (1889) the Supreme Court upheld the conviction of the Appellant, the president of the State National Bank of Raleigh, North Carolina, for forgery. The court felt that in that particular that since the crime that Cross was charged with was not one specifically against the United States but rather was a fraud against the people of the State of North Carolina then that State could successfully prosecute the Appellant. Mr. Justice Harlen speaking for the Supreme Court stated at 132 U.S. at pages 139 and 140:

[1] Similar to §657 except that it relates to Federal Banks rather than savings institutions.

"The argument on behalf of the plaintiffs in error fails to give effect to the established doctrine that the same act, or series of acts, may constitute an offense equally against the United States and the state, subjecting the guilty party to punishment under the laws of each government. [citations omitted] . . . If it were competent for Congress to give exclusive jurisdiction to the courts of the United States of the crime of falsely making or forging promissory notes, purporting to be executed by individuals, and made payable to or at a national bank, or the crime of uttering or publishing as to any such falsely made or forged notes, it has not done so. Its legislation does not assume to restrict the authority which the states have always exercised of punishing in their own tribunals the crime of forging promissory notes, and other commercial securities, executed by private persons, and used for purposes of private business. The forging of such instruments is nonetheless injurious to the welfare of the people of the state because they happened to be made payable to or at banking associations which come into existence under the authority of the United States. . . . The forgery may have been committed in order that the instrument forged might thereafter become the basis of false entries upon the books of the bank. But that circumstance cannot defeat the authority of the state, charged with the duty of protecting its own citizens, from punishing the forgery as in itself a distinct, separate offense, committed within its limits and against its laws."

In the case at bar the fraud perpetrated was not only against the federal banking system and against the United States, but is also against the depositors and shareholders of Montgomery Federal Savings and Loan Association, presumably some of which are Maryland citizens.[2]

[2] Not to mention the fact that the locus of the Association's assets and the deposits in question was in Maryland.

The prosecution of the Appellant in this case was not an attempt by the State of Maryland to override the policy of any federal statute, but rather it was an attempt to assert jurisdiction under a statute applicable to all fiduciaries in the State of Maryland. The statute in question does not have any relationship to an attempt to assert control of federally chartered associations. See *Uphaus v. Wyman,* 360 U.S. 72, 79 S. Ct. 1040, 3 L. Ed. 2d 1090 (1959). The Court of Special Appeals of Maryland found that different sovereignties had the right to prosecute in such circumstances, citing *Westfall v. U.S.,* 274 U.S. 256, 47 S. Ct. 629, 71 L. Ed. 1036 (1927) and others. It is submitted that the language quoted by the Court of Special Appeals of Maryland at 29 Md. App. page 481 is applicable:

> "An act denounced as a crime by both federal and state sovereignties is an offense against the peace and dignity of both, and may be punished by each. *U.S. v. Jackson,* 470 F.2d 384 (5th Cir. 1972)."

Title 12 U.S.C., § 1464(d) (4) (A) permits the removal of an association officer who breaches his fiduciary duty. Title 12, U.S.C., § 1730(g) (1) authorizes the removal of an officer of any association insured by the Federal Savings and Loan Association Corporation for breach of his fiduciary duty. Clearly, the Homeowners' Loan Act of 1933 assumed the existence of fiduciary duties from its inception. Similarly, Maryland statutes impose fiduciary duties upon officers of savings and loan associations. Federal savings and loan associations fell, at the time of the incident, within the scope of Article 23, § 161, et seq. Article 23, § 161B(c) (1966 Rep. Vol.) stated:

> "Unless federal laws or regulations provide otherwise, federal associations incorporated pursuant to the Homeowners' Loan Act of 1933, as amended, shall be subject to the provisions of this subtitle . . . ."

Furthermore, Article 23, § 159(d) (1969 Cum. Sup.) permitted State chartered savings and loan associations to convert to membership in the Federal Home Loan Bank System. That section further provided that any savings and loan association that did convert shall "for the purposes of taxation or doing business in this state . . . be regarded as a domestic corporation of this state . . . ." Significantly, Montgomery Federal Savings and Loan Association comes within this provision since it was originally a state chartered institution and later converted.

Clearly, since Montgomery Federal Savings and Loan Association is a domestic corporation of this state, it is subject to the provisions of the Maryland Uniform Fiduciaries Act, Estates and Trust Article, § 15 201 et seq. The definition of fiduciary applies to the officer of a corporation as well as any other person acting in a fiduciary capacity, for any person, trust or estate. Person is defined as including a corporation or partnership or other association. Obviously, the Appellant was an officer of a savings and loan association who owed the same fiduciary duties to the association and its members, depositors and stockholders as a corporate officer owes to his corporation and stockholders. Under such circumstances it is suggested that the State of Maryland has a legitimate interest in the deposits, obligations and other activities of Montgomery Federal Savings and Loan Association to the extent that the interests of its citizens exist in those deposits. Therefore utilizing the general proposition that a national bank is subject to state law unless that law interferes with the purposes of its creation or destroys its sufficiency or is in conflict with some

paramount federal law, it is submitted that Maryland can enforce its criminal breach of fiduciary duty statutes against the Appellant in the instant case, *Lewis v. Fidelity and Deposit Company,* 292 U.S. 559, 54 S. Ct. 848, 78 L. Ed. 1425 (1934). In *Lewis, supra,* Mr. Justice Brandeis speaking for the Supreme Court held that the obligations of a bank to a state may be defined by the law of that state. In the instant case it is submitted that the savings and loan association was mandated to be operated in such a way that its president and board of directors did not breach their fiduciary duties to their members. See also *Jennings v. United States Fidelity & Guaranty Company,* 294 U.S. 216, 55 S. Ct. 394, 79 L. Ed. 869 (1935).

In the case of *In Re Election of Directors,* 51 N.Y. Supp. 2d 816 (1944) the New York Supreme Court was called upon to decide a question involving a State savings and loan association which converted to a federal savings and loan association under the Home-owners' Loan Act. The New York court was called upon specifically to decide the question of whether or not the election for Board of Directors violated the charter of the savings and loan association. The court held that it had jurisdiction to consider the issue since national banks are citizens of the State in which they are located, and although subject to the paramount authority of the United States they are also subject to State laws as to their affairs unless such laws conflict with the paramount law of the United States. The court found that since the federal statutes in question contain no provisions for review of election of directors, it had jurisdiction. In the instant case there is no apparent conflict between the policy of the State of Maryland and the national banking policies. Therefore, Maryland should be permitted to enforce its criminal statute. *Uphaus v. Wyman, supra, Abbate v. United States,* 359

U.S. 187, 79 S. Ct. 666, 3 L. Ed. 2d 29 (1959); *People of California v. Zook,* 336 U.S. 725, 69 S. Ct. 841, 93 L. Ed. 1005 (1949); and *Cross v. North Carolina, supra.* See also *Erich v. Webb,* 336 F.wd n53 (9th Cir. 1964).

Pursuant to the provisions of Title 18, U.S.C., § 3231:

> "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the State, of all offenses against the laws of the United States.
>
> Nothing in this Title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof."

Clearly Maryland is not attempting to divest the United States of original jurisdiction of offenses against the United States. In the instant case Maryland is not attempting to prosecute the Appellant for violation of federal law, but rather is attempting to prosecute the Appellant for violation of state law. As it has been stated before, the mere fact that an offense is committed against both sovereignties is not sufficient to conclude that federal law has preempted prosecution in the area.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Appellant's appeal from the Court of Special Appeals of Maryland should be dismissed.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General
of Maryland,

CLARENCE W. SHARP,
Assistant Attorney General,
Chief, Criminal Division,

BERNARD A. RAUM,
Assistant Attorney General,
Counsel for Appellee.

APPENDIX A

FEDERAL HOME LOAN BANK BOARD

Inter-office Communication

From Office of the General Counsel Date 5-28-69

To: Paul F. Bowman, Jr.
Regional Supervisor
Office of Examinations
and Supervision

Subject, American FS&LA of
Duval County
Jacksonville, Florida

In your memorandum of April 11, 1969 you ask for the opinion of this office regarding the following situation:

> Since 1965 the subject association has been depositing funds in commercial banks for the benefit of finance companies. Specifically, the banks require, when granting a line of credit to finance companies, that the companies maintain, in the form of demand deposits, compensating balances amounting to 15.0 percent of the credit line. In lieu of maintaining their own balances the finance companies arrange for third parties (in this case, the association) to open such accounts. The bank pays the association nothing for these deposits; the finance companies pay the association one-half of 1.0 percent above the prime rate — currently a total of 7.0 percent.

It is the contention of the Supervisory Agent that a Federal savings and loan association has no authority to engage in transactions of this type. The management of the association maintains that since the deposits may be withdrawn at any time without notice to the finance companies, such deposits provide a method by which income can be earned by the funds which are available to satisfy the liquidity requirements of §§ 545.8-2 and 523.12 of the Regulations.

First, as to the nature of the transaction, it is apparent that although the maintenance of a compensating

balance is similar to making a loan, it is not in fact a loan so long as the unimpaired right to the funds remains in the association. The power of a Federal savings and loan association to deposit funds in a bank demand deposit account is not specifically stated in the Charter or regulations but is rather an implied power. The liquidity requirements of the Bank Regulations presume the right of an association to deposit funds in a Bank. An implied power is, however, a limited one; it must further the basic goals and objectives of the association.

There is some doubt as to whether, under present law and regulations, a Federal association can legitimately be compelled to lower its liquidity ratio and increase the number and amounts of its loans, whatever may be our opinion of a high liquidity ratio. At some point the maintenance of a very conservative attitude toward liquidity might result in a complete abandonment of the fundamental objective of a Federal association, *i.e.*, promoting home financing; however, the basis for penalizing an institution when this point is reached is unclear. As long as an association does not violate the provisions as to investments in § 545.9, and does not make loans contrary to the Federal regulations, there is no obvious basis for compelling a Federal association to make more loans on the security of first liens on real estate.

Secondly, above I stated that the association must at all times have an unimpaired right to the funds. By this I mean that the right of withdrawal is not limited by an agreement with either the finance company or the bank. If the bank has any right whatsoever to set off the deposit against the credit advances to the finance company, the entire transaction would be improper in that it would be a financial transaction unrecognized and unauthorized by the lending and investment regulations. Further, any restriction upon the deposit, or any right of other party or parties in the deposit would mean that said deposit would not qualify under §§ 545.8-2 and 523.12 of the Federal Home Loan Bank System Regulations as cash in satisfaction of the

liquidity requirement. Section 523.12 provides in subsection (b):

> (b) The term "cash" means cash on hand, unpledged deposits in a Federal Home Loan Bank or State bank performing similar reserve functions, and *unpledged demand deposits in domestic banks,* not under the control or in the possession of appropriate supervisory authority. [Emphasis supplied.]

By using the term "unpledged" it appears that the intention of the Board was that the funds so deposited should be completely unfettered, *i.e.,* no one except the depositing association should have any right, legal or equitable, in the funds. From this it follows that only the depositor and no one else should have the right to withdraw said funds.

In addition, your memorandum asked my opinion as to what effect the proposed liquidity regulations, contained in Board Resolution No. 22,594 issued February 18, 1969, would have on the situation discussed above. First, the requirement as to the asset being "unpledged" as contained in § 523.10(a) of the proposed regulation remains unchanged. If, as was mentioned above, anyone had any rights which prevented the association from having the complete and absolute right to withdraw the funds at any time such funds would not be considered as "unpledged". Secondly, it should be noted that the prohibition contained in § 523.10(a) (4) (ii), as proposed, that "no consideration is received by the member from a third party in connection with the making or acquiring of such deposit by the member", does not pertain to demand deposits. Since the proposal contained in said Board Resolution is still open for change and revision, the Office of Examinations and Supervision might wish to recommend the inclusion of a prohibition similar to the one contained in § 523.10(a) (4) (ii) in § 523.10(a) (1) if in the judgment of your Office the practice discussed in this opinion is detrimental to

the safe and sound management of members of the Federal Home Loan Bank System.

ARTHUR W. LEIBOLD, JR.,
General Counsel,
By: /s/ MAX WILFAND,
Deputy General Counsel.